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In the Supreme Court of the United States

ROBERT HOREL, WARDEN, *Petitioner*,

v.

FELIX SOLORIO VALDOVINOS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether AEDPA deference applies to the state supreme court's summary denial of a claim under *Brady* v. *Maryland*, 373 U.S. 83 (1963). See *Harrington* v. *Richter*, 130 S. Ct. 1506 (2010) (No. 09-587).

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PETITION FOR WRIT OF CERTIORARI

Robert Horel, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-25a) is reported at 598 F.3d 568. The order of the court of appeals denying rehearing and rehearing en banc (App. 106a), the order of the district court denying habeas corpus (App. 26a-79a), the orders of the state supreme court summarily denying habeas corpus (App. 80a, 81a), and the opinion of the state appellate court affirming the criminal conviction on direct appeal (App. 82a-105a) are unreported.

JURISDICTION

The opinion of the court of appeals was filed on March 10, 2010. App. 1a. An order denying the Warden's petition for rehearing and rehearing en banc was filed on April 26, 2010. App. 106a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits

> in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

A. State Court Trial and Appeal

In May 1998, Nelson Caballero was shot twice, execution-style, outside a San Jose nightclub by a man who wore a cowboy hat and dark leather jacket and fled in a car. Respondent Valdovinos was arrested a month later in Oregon, shortly after authorities located his car there. The license plates had been removed. App. 90a; ER 437-40. [1] Valdovinos had $3,000 to $7,000 in cash (ER 479), but he had left behind his paycheck (App. 90a) at his janitorial job in San Jose (RT 203-04).

Valdovinos was charged with first degree murder. At trial, three acquaintances of the victim—Joaquin Diaz, Tracy Castro, and Kyong "Say" Miranda—identified Valdovinos as the shooter. App. 3a. Other evidence established that Valdovinos's car generally matched contemporaneous descriptions of the getaway vehicle. App. 75a, 87a; ER 251-52, 359-60, 390; RT 125, 132, 149. Shown a photo of Valdovinos's car, Castro identified it as the one in which the killer left the scene. ER 360.

Aurelio Lopez was Valdovinos's roommate and cousin. App. 83a. At the preliminary hearing, he

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[1] "ER" refers to the Excerpts of Record, "SER" to the Supplemental Excerpts of Record, and "RT" to the Reporter's Transcript of the trial.

testified equivocally that Valdovinos had what looked like a gun at the club and that, just before the shooting, Valdovinos was talking to a group of persons that included Caballero. App. 46a-47a, 86a; ER 228, 489-90. Cross-examined at the preliminary hearing by the defense about his prior statement to the police that Valdovinos had a gun, Lopez testified that he had told the police what they wanted to hear and that he had feared he himself might be a suspect in the killing. App. 31a, 52a, 87a, 89a, 93a. After Lopez absconded on the eve of trial, his preliminary hearing testimony and his post-arrest statement to the police were read to the jury. App. 34a, 46a-49a, 86a, 93a.

Isidro Garcia, another of Valdovinos's roommates (App. 30a), said Valdovinos was at the club and wore a gray cowboy hat, black leather jacket, and boots. App. 86a. Garcia testified that Lopez wore the same thing, but he was impeached with his statement to the police that Lopez had worn a brown baseball cap. App. 30a, 90a. Garcia said he himself was hatless. App. 30a.

Testimony at trial revealed for the first time that four days after the crime the police found an ounce of methamphetamine and a nine-millimeter handgun (not the murder weapon— SER 110-12) in Lopez's bedroom. App. 89a, 93a-94a; ER 416. Lopez was arrested at that point, both on an earlier warrant for gun and drug possession and for the possession of the gun and drugs in his bedroom, but the latter incident produced no charges against Lopez. App. 89a. The arrest report from the incident was filed in Lopez's case but not in the homicide case. App. 94a; ER 464-65.

As with the gun and drugs found in Lopez's bedroom, the prosecutor and defense counsel also learned at trial for the first time that the police had

shown two photographic lineups to eyewitnesses Diaz and Castro. App. 100a; ER 332-33; People's Exhs. 17, 18. Diaz had chosen Valdovinos's photo in both lineups but was unsure of his identifications. App. 89a, 90a. He could not say whether the photograph he selected in each lineup was the same person. RT 354. He was uncertain about the first lineup because the shooter had worn a hat, whereas no one in that lineup wore one. ER 347. No one in the second lineup wore a hat either. See ER 353. At trial, Diaz did not recognize Valdovinos as the person he selected in the lineups. ER 349.

Castro had chosen photographs of different persons in each lineup, and neither one depicted Valdovinos. App. 88a, 90a.

Though Valdovinos was the only person in both lineups, his appearance differed markedly in each lineup and differed from his appearance at trial as well. App. 55a, 56a. The persons in the second lineup had shorter hair than the persons in the first one. App. 56a; ER 353. Valdovinos had a mustache in the lineup photographs but not at trial. ER 352. Lopez was in neither lineup. App. 31a, 90a. Lopez and Valdovinos were of a similar size and stature (App. 32a), but a detective denied that they looked alike. ER 466. No one suggested otherwise. A photograph of Lopez was in evidence at trial. RT 549, 560; People's Exh. 20.[2]

The defense sought a mistrial based on the delayed disclosures of the photo lineups and Lopez's possession of a handgun and drugs. The trial court denied the request. App. 93a-94a, 100a. However,

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[2] In federal court, Valdovinos supplied a photograph of Lopez from a police report. ER 141. The written record does not establish whether that photograph was the one admitted at trial.

the court instructed the jury that the prosecution had unjustifiably "concealed and/or failed to timely disclose" the photo lineups. App. 33a n.6, 100-01a. Defense counsel subsequently argued to the jury that Lopez's nonappearance at trial and the decision not to charge him with the gun and drugs in his bedroom showed that he had incriminated Valdovinos in exchange for his own freedom. RT 666-67. Counsel further suggested that Lopez might be the killer. App. 95a-96a. Counsel argued that the belated disclosure of the lineups was "sloppy police work" or even "deliberate concealment," that Castro could not identify Valdovinos, that Diaz was a felon on probation who identified the person the police wanted identified, and that the killing was a "drug deal gone bad." App. 45a, 96a, 101a-02a. The prosecutor argued that both the direct and circumstantial evidence proved Valdovinos was the shooter whether or not the killing stemmed from a drug deal. RT 678.

The jury returned a verdict of first degree murder and found that Valdovinos personally used a firearm and proximately caused injury to the victim by discharging it. App. 91a.

The California Court of Appeal affirmed the judgment, rejecting (among other claims) the one that the untimely disclosure of the photographic lineups violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). App. 64a, 95a-96a, 101a-02a.

B. First State Habeas Corpus Petition

Valdovinos did not petition for direct review of the state appellate court decision. App. 36a. Instead, Valdovinos submitted to the California Supreme Court a habeas corpus petition in which he asserted, among other claims, that the state had violated

Brady by its untimely disclosures at trial of the photo lineups and the drugs and gun from Lopez's bedroom. See App. 36a. The state supreme court denied the petition (App. 7a, 36a), stating simply, "The petition for writ of habeas corpus is DENIED." App. 80a.

C. First Federal Habeas Corpus Petition

Valdovinos filed a federal habeas corpus petition, again asserting a *Brady* violation based on the belated disclosure of the lineups and Lopez's gun and drugs. SER 7, 56-60. In response to one of Valdovinos's claims of ineffective assistance of counsel (SER 7, 60-78), the state tested Lopez's gun, determined that it was incompatible with the murder weapon, and advised the district court, SER 110-12.

In a traverse, Valdovinos's appointed habeas counsel referred to items discovered by associate habeas counsel in a police case file and allegedly not disclosed to the defense. One was a photograph depicting Jose Mongia, a Hispanic male wearing a dark cowboy hat and a dark jacket. Mongia was one of several witnesses the police interviewed at the nightclub after the shooting. App. 7a-8a, 26a, 62a; ER 131. Another item in the case file was an anonymous letter, written in Spanish and addressed to a relative of Caballero's. App. 7a, 61a, 71a-72a; ER 153-54. According to the defense investigator's translation of the letter, the author denied knowing who the shooter was but said that a man named Ramon Balemas had contracted for the victim's murder over a drug debt. App. 7a, 61a, 72a-73a; ER 150-51. The record does not show when the authorities received the letter or what, if anything, the defense did to try to find out when.

A three-sentence declaration by trial counsel asserted his unawareness of the letter, but the

declaration was silent as to whether he knew of the Balemas drug-hit story. App. 73a; ER 157. Trial counsel also did not say how, if it all, disclosure of the letter might have affected the defense investigation. App. 73a; ER 157. Nor did trial counsel mention any photograph. ER 157.

In an apparent response to the state-ordered test that ruled out Lopez's handgun as the murder weapon (SER 110-12), the traverse also included a declaration from associate habeas counsel in which she stated what one Juan Ledezma had told her. According to her, Ledezma said Aurelio Lopez told him that Lopez had had *two* guns, one nine millimeter and one "380" (the caliber of the murder weapon). Ledezma also reportedly said that Lopez had admitted to Ledezma that Lopez was the killer and that he had blamed Valdovinos. App. 7a, 61a-62a; ER 126-27. Accompanying habeas counsel's declaration was an unauthenticated, untranslated statement in Spanish, purportedly written by Ledezma. App. 74a; ER 130. Associate habeas counsel said she was unable to prepare a formal declaration for Ledezma to sign because he was leaving for Mexico that afternoon. ER 126, 127.[3]

The district court ruled that the additional evidence in the traverse rendered "unexhausted" three of the claims in Valdovinos's petition, including the *Brady* claim and an ineffective assistance of counsel claim. App. 8a, 26a-27a, 36a.

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[3] The district court found that the Ledezma statement was not *Brady* material, inasmuch as there was no claim that the prosecution or police had ever known of the statement or of Ledezma. App. 74a-75a. The court of appeals agreed with the district court's conclusion on that point. App. 16a.

D. Second State Habeas Corpus Petition

Valdovinos returned to state court and raised his newly revised claims in a second habeas corpus petition. App. 8a, 36a-37a, 108a-22a. Valdovinos framed his *Brady* claim by aggregating the belatedly disclosed evidence with the allegedly undisclosed evidence. He wrote: "The prosecution violated Brady . . . by not disclosing evidence of the gun, Lopez's favorable treatment, the pictures of others dressed like Valdovinos, photographic lineups, and the letter describing the killing as a contract killing." App. 120a (title of claim, from table of contents in memorandum of points and authorities supporting second state habeas petition); block capitalization omitted. The California Supreme Court denied the second petition (App. 8a, 37a) exactly as it had denied the first one: "Petition for writ of habeas corpus is DENIED." App. 81a.

E. Amended Federal Petition

Back in federal court, Valdovinos moved to amend his federal petition with the newly exhausted claims. App. 8a, 9a, 27a. The district court granted the motion over the Warden's opposition (ER 56; see App. 9a-10a, 12a-13a, 13a-14a, 27a) and denied the Warden's motion for authorization to file an interlocutory appeal, ER 54.

The district court denied the amended petition on the merits. App. 8a, 27a, 79a. After considering collectively the information belatedly disclosed at trial and the allegedly undisclosed material found by habeas counsel in the state's files, the court concluded that the alleged *Brady* material "fails to raise a doubt about the outcome of the trial." App.

75a. The court noted strong eyewitness testimony, the similarity of Valdovinos's car to the getaway vehicle, and Valdovinos's flight to Oregon. *Id.*

F. The Ninth Circuit's Decision

The court of appeals reversed the district court and instructed it to grant a conditional writ. App. 25a. Finding *Brady* error (App. 14a, 22a, 24a), the court of appeals held that Valdovinos had been denied a fair trial by "the cumulative effect of the suppressed evidence" (App. 22a), namely, the gun and drugs in Lopez's bedroom, the photo lineups, Mongia's photograph, and the anonymous letter. App. 16a-22a; see App. 24a (concluding that the "collective effect of the *Brady* evidence was material. . . .").[4] The court did not address the state supreme court's denial of Valdovinos's revised *Brady* claim in his second state habeas corpus petition, nor did it mention the deferential standard of review required by section 2254(d).

On April 26, 2010, the court of appeals denied the Warden's petition for rehearing and rehearing en banc. App. 106a. The court granted the Warden's motion to stay the mandate.

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[4] In view of its finding that the *Brady* violations warranted habeas relief, the court of appeals found it unnecessary to consider "the cumulative prejudice of the *Brady* violations with the ineffective assistance of counsel claim." App. 24a n.4.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRONEOUSLY GRANTED RELIEF BY CONSIDERING *DE NOVO*, RATHER THAN DEFERENTIALLY UNDER 28 U.S.C. § 2254(d), THE *BRADY* CLAIM THE STATE SUPREME COURT HAD SUMMARILY DENIED ON THE MERITS.

In *Harrington* v. *Richter*, 130 S. Ct. 1506 (2010), 09-587, a case pending in this Court and involving a Ninth Circuit grant of habeas corpus relief on a claim summarily rejected by the California Supreme Court, this Court directed briefing on the following question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U.S. 668 . . . ?" An affirmative answer by the Court to that question should compel the denial of a writ of habeas corpus in this case because of two factors. First, the court of appeals here granted the writ by conducting *de novo* review of a claim the California Supreme Court had summarily denied. Second, Valdovinos's claim would have to be rejected under a deferential review.

The appellate court committed at least four major errors in addition to using *de novo* review. It unjustifiably assumed the defense was unaware of undisclosed information. It considered evidence the prosecution disclosed at trial as if the prosecution had never disclosed it. It inflated the importance of both the undisclosed and belatedly disclosed information. And it ignored uncontested trial evidence establishing that Valdovinos was the killer. As a result, the circuit court failed to recognize that the state supreme court could reasonably have rejected the notion that the "collective effect of the *Brady* evidence was material. . . ." App. 24a. If anything, the record not only permitted but

compelled the state supreme court's presumptive conclusion that Valdovinos's fully revised *Brady* claim lacked merit. Therefore, if this Court were to decide in *Harrington* v. *Richter* that claims summarily denied in state court require deferential review, the circuit court would have to deny habeas corpus in this case.

A. The Court of Appeals Erred by Considering the Expanded *Brady* Claim *De Novo*.

The Ninth Circuit did not consider, much less review deferentially under section 2254(d), the California Supreme Court's rejection of Valdovinos's revised *Brady* claim. The panel's analysis did not purport to review any state-court adjudication of the revised *Brady* claim for reasonableness under section 2254(d) but instead framed its analysis only in terms of direct *de novo* review of the claim. In contrast, the panel reviewed for section 2254(d) "reasonableness" a different claim decided by the state court of appeal.[5] By reviewing part of the state appellate court ruling and by ignoring the state supreme court's rejection of the second habeas petition, the circuit court made clear that it was not reviewing the state high court's rejection of Valdovinos's expanded and revised *Brady* claim.

It is unclear exactly why the circuit court did not review the California Supreme Court's rejection of the *Brady* claim. The circuit court wrote, "In the

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[5] The Ninth Circuit concluded that the state appellate court reasonably rejected Valdovinos's claim that the prosecution's belated disclosure of the discovery of the gun and drugs in Lopez's bedroom unconstitutionally compromised the defense's cross-examination of Lopez at the preliminary hearing. App. 19a-20a.

event that the state court issues a summary denial of the habeas petition, the district court conducts an independent review of the record. *Richter* v. *Hickman*, 578 F.3d 944, 952 (9th Cir. 2009) (en banc)." The circuit court did not explain whether or to what extent "independent review" includes deferential review, and the cited page in the Ninth Circuit's decision in *Richter* is unclear on that point as well. If the circuit court was implying by its use of the term "independent review" that the state supreme court's decision deserved no deference because it was a summary denial, the question this Court ordered the parties to address in *Richter* plainly throws into doubt the circuit court's ruling.

As suggested elsewhere in its opinion, the circuit court may have assumed, erroneously, that Valdovinos did not present his finally revised *Brady* claim to the state high court. Without mentioning the state supreme court's summary denial of Valdovinos's second state habeas petition, the court of appeals offered a reason for not deferring to the ruling of the intermediate state court of appeal on direct review. The Ninth Circuit explained, "The California court did not have cause to consider the cumulative *Brady* impact because it had before it only the *Brady* claim based on the undisclosed [*sic*] photo lineups." App. 20a. This explanation must refer to the intermediate state appellate court, because that court alone "had before it only the *Brady* claim based on the undisclosed [*sic*] photo lineups." App. 20a.

To the extent the Ninth Circuit concluded that the state courts had reviewed only part of Valdovinos's *Brady* claim, it was simply wrong. The California Supreme Court considered the revised and expanded claim when it summarily denied Valdovinos's second habeas corpus petition. In that

petition, Valdovinos claimed, "The prosecution violated Brady . . . by not disclosing evidence of the gun, Lopez's favorable treatment, the pictures of others dressed like Valdovinos, photographic lineups, and the letter describing the killing as a contract killing." App. 120a; see also App. 113a (petition's contention number 12 that "[t]hese newly discovered additional materials strengthen the claims Valdovinos has previously made in this Court. . . ."). The California Supreme Court necessarily rejected the revised *Brady* claim, including the assertion of cumulative prejudice, when it denied the petition.

The state supreme court's summary denial of Valdovinos's revised *Brady* claim was a rejection of the claim on its merits. *Griffey* v. *Lindsay*, 345 F.3d 1058, 1068, vacated as moot, 349 F.3d 1156 (9th Cir. 2003); *Hunter* v. *Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); see *In re Robbins*, 959 P.2d 311, 340 n.34 (Cal. 1998); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993). As a denial of the claim on the merits, the state supreme court's decision required a federal habeas court to affirm it unless the decision was unreasonable. See *Schriro* v. *Landrigan*, 550 U.S. 465, 473 (2007). The state supreme court's denial of the *Brady* claim deserved particular deference under section 2254(d) because the *Brady* rule is a general one, requiring an assessment of "materiality" in light of all the circumstances. See *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."). Thus, by erroneously failing to review the California Supreme Court's rejection of the revised *Brady* claim at all, the Ninth Circuit necessarily erred in failing to review that decision deferentially.

B. Under Deferential Review, the Court of Appeals Would Be Compelled to Reject the *Brady* Claim.

Proper application of section 2254(d)'s deferential review standard to the *Brady* claim would compel denial of the writ. The state record reasonably supported (and indeed compelled) a conclusion that no *Brady* violation occurred.

In deciding that "the cumulative effect of the suppressed evidence denied Valdovinos a fair trial" (App. 22a), the court of appeals erred not only by applying *de novo* review but by inflating the impact of four items of evidence: the Mongia photograph (App. 16a-18a, 21a), the anonymous letter proposing the Balemas drug-debt story (App. 18a-19a), the photographic lineups (App. 21a-22a), and the gun and drugs found in Lopez's bedroom (App. 19a-20a). The court also erred by unaccountably ignoring powerful evidence pointing to Valdovinos as the actual killer. Whether assessed individually or cumulatively, the belated disclosures and alleged nondisclosures had no effect. Certainly, the state supreme court could reasonably have so concluded.

1. The Mongia Photograph

The Ninth Circuit found the Mongia photograph significant because "[v]arious inconsistencies existed between the witnesses' testimony about the shooter's appearance" and because "[t]he photograph has the potential to undermine the significance of the single commonality of these descriptions—the cowboy hat—that the court identified as one of the stand-out characteristics of the shooter." App. 17a.

The court erred by ignoring the fact that trial counsel's declaration in the federal habeas traverse

did not mention the Mongia photograph. Pp. 73a; ER 157. The court thereby overlooked Valdovinos's omission of a critical part of any *Brady* claim—namely, that the evidence be suppressed by the state. Valdovinos never established that the prosecution failed to disclose the Mongia photograph or that defense counsel at the time of trial was unaware of Mongia's involvement in the case.

The court of appeals' assessment of the photo also ignored the undisputed evidence that (1) the shooter was not the only person wearing a cowboy hat at the scene, and (2) none of the three persons who identified Valdovinos as the shooter did so *because* he wore a cowboy hat. The three identified him as the shooter when he was *not* wearing a cowboy hat, at the preliminary examination and at trial, despite the fact that he *was* wearing one at the nightclub. Thus, regardless of whether a cowboy hat was a "stand-out characteristic[] of the shooter," that characteristic had no significant effect on any of the eyewitness identifications. Likewise, the Mongia photo suggested nothing new about the reliability of those identifications.

Mongia's photograph was unimportant for another reason: all the evidence showed that the shooter immediately fled the crime scene in a car, yet Mongia remained available to the police for an interview. Therefore, he could not have been the killer. And because Mongia was not the killer, it made no difference that he was dressed like him, given the undisputed evidence at trial that several persons at the club were dressed like the shooter. Since the Mongia photograph only confirmed what everyone already knew—that several persons were dressed like the shooter—it had no value to the defense.

As the district court noted (App. 74a), no admissible evidence showed that Mongia even witnessed the shooting. Thus, there is no reason to believe that Mongia had any useful information to provide. The Ninth Circuit ignored this factor as well as all those showing that Mongia's appearance was immaterial.

2. The Anonymous Letter

The court of appeals wrote, "Given the conflicting identification testimony and a letter pointing to another culprit, the non-disclosure of the letter denied the defense important investigative opportunities that had the potential to lead to admissible evidence." App. 19a. The court's conclusion is inexplicable and unsustainable, particularly under deferential review of the state court adjudication for simple reasonableness.

Because the letter writer said he was not the shooter, the letter "point[ed] to *another* culprit" (emphasis added)—i.e., not Valdovinos—only if Valdovinos himself was the writer or Valdovinos directed the letter to be written in his name. In either of those cases, Valdovinos knew of the letter, so its nondisclosure could not have violated *Brady*. *Rhoades* v. *Henry*, 596 F.3d 1170, 1181 (9th Cir. 2010) (no *Brady* violation when a defendant possessed the information he claims was withheld); *Ward* v. *Hall*, 592 F.3d 1144, 1183 (11th Cir. 2010) (government has not suppressed evidence in violation of *Brady* if the defendant knew of the information or had equal access to it); *United States* v. *Ladoucer*, 573 F.3d 628, 636 (8th Cir. 2009) (no violation of *Brady* in government's failure to provide transcript that was as available to the defendant as to the government); *United States* v. *Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) (no *Brady* violation where the

exculpatory information was not only available to the defendant but was in a source where a reasonable defendant would have looked). Since the record reasonably permitted the conclusion that Valdovinos knew of the letter, the state supreme court did not act unreasonably in finding it not to be *Brady* material.

In any event, the court of appeals never identified the "important investigative opportunities" the defense lost as a result of nondisclosure of the letter. In his declaration, trial counsel said he was unaware of the letter but did not say he was unaware of the information in it: the Balemas drug-hit story. Speculative inferences as to what counsel might have discovered had evidence been disclosed do not establish materiality under *Brady*. *Wood* v. *Bartholomew*, 516 U.S. 1, 5-6 (1995). The opinion of the court of appeals does not offer even that level of speculative inference.[6]

3. The Photographic Lineups

The Ninth Circuit wrote: "Significantly, both the state court and the district court's findings of no prejudice relied heavily on the 'strong' eyewitness

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[6] Instead of identifying the investigative opportunities the defense lost, the circuit court remarked that "only law enforcement officials are in a position to authenticate the letter, to say how and when the letter came to be in the file—a task that might have been possible had the prosecution disclosed the letter when it was received." App. 19a. This statement rests on the unwarranted assumption that the authorities had the letter before trial, and it ignores the fact that associate habeas counsel made no effort to learn when the letter came into the state's possession. The police cannot be faulted for failing to authenticate what they were never asked to authenticate.

testimony." App. 21a. Disagreeing with those purported findings, the court of appeals stated:

> But the eyewitness testimony was contradictory about the shooter's physical appearance, his size, build, and what he was wearing. The photo lineup evidence rendered the identifications questionable. Castro identified Valdovinos as the shooter at the preliminary hearing, but she picked a person other than Valdovinos in both lineups. Diaz also identified Valdovinos at the preliminary hearing, but could not identify him from the photo lineups with any degree of certainty. And Valdovinos was the only person included in both photo lineups, despite the fact that Lopez, who also was present at the nightclub that night, was similar in build and stature to Valdovinos.

App. 21a-22a.

This passage contains several errors. First and foremost, the circuit court misunderstood the issue.

For purposes of determining materiality of the photographic lineup evidence, the issue was not, as the court of appeals assumed, the extent to which the evidence of the lineups affected the probative value of the eyewitness identifications. That might have been the question if the lineup evidence had not been disclosed at trial. But it *was* disclosed at trial. The court of appeals mistakenly evaluated this belatedly disclosed evidence as if it had never been disclosed.

Under AEDPA's deferential standard of review, the proper question is whether the state supreme court could reasonably find that the jury would not have considered the case more favorably to the defense if the prosecution had disclosed the photo lineups earlier than at trial. The state court clearly could have so found. The parties at trial treated the

evidence just as they would have if the evidence had been timely disclosed, as the state appellate court (App. 101a-02a) and the district court (App. 68a-69a) recognized. Defense counsel argued to the jury that the misidentifications by Castro undermined her identification of Valdovinos at trial and that Diaz's tentative identifications were unreliable. See App. 68a-69a, 101a-02a. Indeed, the belated disclosure may actually have helped Valdovinos because it gave the defense the benefit of the trial court's instruction to the jury that the prosecution had unjustifiably concealed and/or failed to timely disclose the photo lineups. Defense counsel took full advantage of the prosecution's misstep and the instruction, excoriating the police in closing argument for their misbehavior. App. 101a-02a. All these factors not only permit but compel the conclusion that the belated disclosure of the photo lineups was immaterial.

The court of appeals ignored the fact that the defense fully exploited both the lineup evidence itself and its belated disclosure. Even if the evidence did "render the identifications questionable" (a dubious assumption discussed below), the jury took that factor into consideration. The jury convicted Valdovinos not by accepting at face value purportedly "questionable" identifications but by crediting the evidence that overcame whatever weakness existed in those identifications.

Second, the court of appeals suggested in the quoted extract that Diaz's uncertain identification of Valdovinos in both lineups tended to undermine Diaz's identification of him at the preliminary hearing and the trial. The state supreme court could reasonably have concluded differently. Viewing the first photo lineup, Diaz said it was difficult for him to be certain because the shooter was wearing a hat, unlike the persons in the lineup. The persons in the

second lineup were hatless, too. Moreover, Valdovinos's appearance changed significantly from one lineup to the other. App. 56a; RT 628 (prosecutor's unrebutted argument to the jury that Valdovinos "looks quite a bit different from one photograph to another"), RT 641-42 (prosecutor's unrebutted closing argument that defendant's appearance changed from photo to photo and at trial). The foregoing factors support the view that Diaz's cautious identification of Valdovinos in both photo lineups enhanced rather than detracted from the reliability of Diaz's identifications of Valdovinos in court. Again, the conclusion need not be compelled for it to be sustainable as reasonable under the AEDPA.

Finally, the court of appeals implied that the lineups were unduly suggestive because Valdovinos was the only person in both (App. 55a), whereas Lopez, who resembled him in build and stature (App. 32a, 90a), was in neither. Again, the state supreme court could reasonably have found to the contrary. The presence of Valdovinos in both lineups made no difference because he looked very different in each lineup. See App. 56a, 88a. Lopez's resemblance to Valdovinos in build and stature made no difference because the photographs in the lineup showed faces, not body types. Moreover, a detective denied without contradiction that Valdovinos and Lopez looked similar (ER 466), and the jury presumably weighed that testimony by comparing the lineup photographs to the photograph of Lopez that was placed into evidence. RT 549, 560. Tellingly, defense counsel did not argue to the jury that his client resembled Lopez, nor did counsel suggest that Diaz's identifications from the lineups might not have occurred if Lopez had been included in one or both. Particularly under the appropriately deferential

standard of review, the record does not permit the conclusion that the photo lineups unfairly pointed toward Valdovinos and away from Lopez.

4. The Gun and Drugs in Lopez's Bedroom

The court of appeals erroneously concluded: "The failure to disclose the gun and drugs found in Lopez's possession, even if not prejudicial on its own, only further solidifies our finding of collective prejudice." App. 22a. As with the photographic lineup evidence, the circuit court appears to have considered the belated disclosure of the evidence at trial as if the evidence was never disclosed. Apart from that error, the court erred by not explaining how Lopez's possession of a handgun and methamphetamine in his bedroom "solidifie[d]" prejudice to the defense. Since the jury knew everything about the discovery of the contraband, the belated disclosure made no difference. Elsewhere in its opinion, the court found reasonable the state appellate court's finding that the belated disclosure did *not* significantly affect the defense's opportunity to cross-examine Lopez at the preliminary hearing. App. 20a. By affirming an explanation of how the belated disclosure of the discovery of the gun and drugs did not prejudice the defense, the circuit court made particularly telling its failure to explain how that belated disclosure did add prejudice.

The whole is not always greater than the sum of its parts, particularly when the value of each part is zero. The court's unelaborated finding of additional prejudice with respect to Lopez's gun and drugs cannot be sustained under a deferential standard of review.

5. Evidence Ignored by the Ninth Circuit

The circuit court unaccountably failed to consider the evidence corroborating the eyewitness identifications. The state high court reasonably did consider that corroboration. Two witnesses, Lopez and Garcia, placed Valdovinos at the nightclub at the time of the shooting. App. 86a. There was no evidence to the contrary. The car in which the killer left the scene looked like Valdovinos's car, which the police found in Oregon shortly before Valdovinos was arrested there. The defense never disputed that Valdovinos's car resembled the getaway car and never sought to explain either Valdovinos's flight to Oregon or the car's missing license plates. The jury could not reasonably have failed to infer that Valdovinos fled the crime scene for Oregon in the same car the shooter used and then tried to conceal his flight by removing the car's license plates. Moreover, the defense never attempted to explain why Valdovinos fled the state so quickly that he left behind his paycheck in San Jose. Plainly, the urgency of his flight and the thousands of dollars he possessed in Oregon made his paycheck and job in San Jose expendable. If, as the anonymous letter suggested, the murder was indeed a contract killing, Valdovinos acted exactly like the hired gun who did it.

By contrast, Lopez remained easily accessible to the police at the home he shared with Valdovinos until the latter's sudden flight from the state. Lopez retained his own personal gun and drugs in his bedroom after the killing, obviously unconcerned that they might be thought to link him to the killing or

that he might be a suspect.[7] No thousands in cash, abandoned paycheck, or missing car tied him to the crime. Given this evidence, the jury had little reason to wonder why Lopez disappeared before trial after he incriminated Valdovinos in his statements to the police and then retreated from those statements at the preliminary examination: Lopez was afraid of the killer or, at a minimum, was trying to protect him. App. 96a. There was no reasonable doubt who that killer was, as the district court concluded. App. 75a ("Even together, the exculpatory evidence fails to raise a doubt about the outcome of the trial."). The circuit court could find otherwise only by ignoring all the evidence pointing to Valdovinos and away from Lopez.

In contrast to the careful evaluation of materiality required for *Brady* claims, see *Kyles* v. *Whitley*, 514 U.S. 419, 441-54 (1995), the court of appeals resorted to conclusory assertions belied by the record. The circuit court's unsupportable analysis compounded the court's erroneous adoption of a *de novo* standard of review. Resolution of *Harrington* v. *Richter* in favor of deferential AEDPA review would require the court of appeals to reconsider this case and deny the writ.

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[7] Once the state showed that Lopez's gun was not the murder weapon, Valdovinos offered the unauthenticated Ledezma statement in an attempt, via double hearsay, to place the murder weapon with Lopez. The defense's belated production of blatantly inadmissible evidence purporting to implicate Lopez only further showed how clearly the evidence at trial failed to implicate him.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted

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